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Supreme Court of the United States

OCTOBER TERM, 1947

No. 832

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY; DELAWARE & HUDSON RAILROAD CORPORATION; DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY; SCOTT M. LOFTIN and JOHN W. MARTIN, as Trustees of the Florida East Coast Railway Company; PENNSYLVANIA RAILROAD COMPANY; and WABASH RAILROAD COMPANY,

Petitioners,

against

ACME FAST FREIGHT, INC.,

Respondent.

MEMORANDUM ON BEHALF OF PLAINTIFF-RESPONDENT

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Petitioners,

against

ACME FAST FREIGHT, INC.,

Respondent.

MEMORANDUM ON BEHALF OF PLAINTIFF-RESPONDENT

Question Presented

Respondent, a freight forwarder regulated under Part IV of the Interstate Commerce Act, 49 U. S. Code §1001, *et seq.*, and the petitioner railroads, utilized by respondent in the transportation services it provides, each issue to their shippers, and publish as part of their tariff classifications, the uniform domestic straight bill of lading, providing, as a condition of recovery for freight loss or damage, for the filing of written notice of claim, within nine months, with "the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose lines the loss * * * occurred * * *" (Sec. 2(b), fol. 70).

The decision below is that a shipper's notice to the respondent satisfies this requirement, a result we believe to follow both from the bill of lading itself, read, as it must be (*Northern Pacific Railroad* v. *Wall*, 241 U. S. 87, 92) in conjunction with 49 U. S. Code §1013, which applies the Carmack Amendment to freight forwarders and makes them receiving and delivering transportation company for that purpose, and decisions of this Court construing the Carmack Amendment as making the conditions of the receiving carrier's bill of lading govern the liabilities of all responsible connecting carriers.

The occasion for this suit was declination by the petitioners and other railroads of a number of claims which respondent had been obliged to pay shippers for losses in rail transportation, following the circulation of an opinion rendered to the Freight Claim Division of the Association of American Railroads, concluding that despite the enactment of Part IV of the Interstate Commerce Act, and §10f3 in particular, notice of claim to rail carriers was essential (fols. 172-210), although notice to responsible connecting carriers within nine months is concededly not required or given, in practice, in the interline settlement of subrogation claims between other carriers subject to the Carmack Amendment (fol. 168).

Statutes Involved

§1013 of the Interstate Commerce Act, Part IV, provides in part:

> "The provisions of Section 20(11) and (12) of this title * * * shall apply with respect to freight forwarders, in the case of service subject to this chapter, with like force and effect as in the case of those persons to which such provisions are specifically applicable, and the freight forwarder

shall be deemed both the receiving and delivering transportation company for the purposes of such section 20(11) and (12)."

§20(11) and (12) of the Interstate Commerce Act, together commonly designated as the Carmack and Cummins Amendments to the Hepburn Act, provide in part:

"(11) Any common carrier, railroad, or transportation company subject to the provisions of this chapter, receiving property for transportation * * * shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass. * * *

"(12) The common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained, the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

§1002 of the Interstate Commerce Act, Part IV, definitions, provides in part:

"(5) The term 'freight forwarder' means any person which (otherwise than as a carrier subject to chapter 1, 8, or 12 of this title) holds itself out to the general public to transport or provide transportation of property, or any class or classes of property, for compensation in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating ship-

ments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to chapter 1, 8, or 12 of this title."

* * * * * * *

"(7) The term 'service subject to this chapter' means any or all of the service in connection with the transportation in interstate commerce which any person undertakes to perform or provide as a freight forwarder, or which such person is authorized or required by or under the authority of this chapter to perform or provide; but such term shall not include that part of the undertaking of any such person for the performance of which the services of an air carrier subject to sections 401-681 of this title are utilized, or for the performance of which transportation by motor vehicle exempted under the provisions of section 303(b)(7a) [motor vehicle transportation incidental to air carriage] of this title is utilized."

Argument

While it is of evident importance to freight forwarders that their recourse against connecting or underlying carriers should be as broad as the liability imposed on them for those carriers' defaults, we believe it unlikely that review of the case by this Court will do more than confirm the conclusion of the Court of Appeals. Further reasons for this conclusion may be mentioned briefly.

1. The established rule is that liability of connecting carriers in transportation subject to the Carmack Amendment is governed by the conditions of the receiving carrier's bill of lading, and that contrary conditions, either in

intermediate bills of lading or arrangements between carriers, are inoperative. The shipper's rights against both the receiving and connecting carriers are perfected by notice to the former, and, since subrogation involves succession to the rights and remedies of the discharged creditor, the receiving carrier's right of subrogation is established by this as well.[1] These propositions not being open to serious dispute, petitioners argue that a statute giving recourse against the "common carrier, *railroad*, or transportation company on whose line the loss * * * shall have been sustained" does not apply to railroads at all, should be revised to mean "another freight forwarder", and that the operation of the statute is confined to the rare instances where two forwarders have joint loading arrangements (Brief, p. 19).

The argument that the enactment of Part IV effected no change in the preexisting relation between regulated carriers and freight forwarders is not only contrary to the express language of this section, but ignores the fact that changes in their rate relationship were authorized as well (49 U. S. Code §1008) and that the House Report enumerated a number of reasons why these changes were considered appropriate. *House Committee Report to accompany S. 210*, 77th Congress, 1st Session, #1172.

2. Petitioners also necessarily argue that freight forwarders are not "carriers" or "common carriers" and the Court of Appeals, by way of dictum, indicated agreement with this. But while early decisions in some jurisdictions differentiated between the liability of a common carrier

1. *Illinois Commercial Texas Railway Co. v. Ward*, 244 U. S. 383; *Texas & Pacific Ry. v. Leatherwood*, 250 U. S. 478; *Galveston Wharf Co. v. Ry. Co.*, 285 U. S. 630; *Mexican Light & Power Co. v. Texas Mexican Railway Co.*, 301 U. S. 732. While stress is placed by petitioners on the novelty of the question here involved, it deals with the reenactment of a familiar and frequently construed statute.

kind of a forwarder who merely arranged for transportation as shipper's agent, as export forwarders do today, decisions both in this Court and in substantially all state courts are that the status and responsibilities of a common carrier are not confined to those owning or operating the means of transportation, but apply to all who undertake or hold themselves out to provide transportation for the public generally. Moreover, the definition of freight forwarders in the statute is itself the definition of a common carrier[2] as was pointed out by Senator Wheeler, Chairman of the Senate Committee on Interstate Commerce at the time of the passage of Part IV, on the occasion of a 1946 amendment to the act. 92 *Congressional Record* 1353. We perceive difference only in detail between Part IV, bringing theretofore unregulated freight forwarder common carriers under regulation, and the Hepburn Act, which brought similarly non-operating express company common carriers under regulation.

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2. *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174, 177, 185; *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, 266.

3. *Rucklind v. Adams Express Co.*, 97 Mass. 124; *Read v. Spaulding*, 18 N. Y. Super. Ct. 395, 404, aff'd 30 N. Y. 630; *Kettenhofen v. Globe Transfer & Storage Co.*, 70 Wash. 845, annotated 42 L.R.A. (N.S.) 902; *Bare v. American Forwarding Co.*, 146 Ill. App. 399, aff. 242 Ill. 208; *Cosmic Glove Co. v. Merchants Dispatch Transportation Co.*, 130 Iowa 327, 329, 106 N.W. 749; *Bloch v. Merchants Dispatch Transportation Co.*, 86 Tenn. 392; 6 S.W. 881; *Larkin v. Public Utility Commission of Ohio*, 124 Ohio St. 554, 180 N.E. 54; Hutchinson on Carriers, 3 ed., §84; Corpus Juris Secundum, Carriers §3(1), 7, 10; 4 Elliott on Railroads, 3 ed. §2106.

"*Express, dispatch and fast freight companies.* Connected with the railroad service are many organizations, sometimes corporations and sometimes individuals, and they are sometimes in reality composed of several railroad companies, that engage in the transportation of goods as 'fast freight lines,' express companies and the like. Such organizations, whether incorporated or not, are often, in a limited sense, railroad carriers, and, in the strict sense, are common carriers. A transportation company not owning or controlling any means of conveyance itself, but engaging on its own behalf in the business of transporting goods through the agency and over the lines of other carriers of its own selection and employment is a common carrier. This has been held the proper view as to express companies, dispatch companies, and fast freight lines. As elsewhere shown express companies, fast freight lines and the like are common carriers in all that the term implies."

4. §1002(5) "The term 'freight forwarder' means *any person who* * * * *holds itself out to the general public to transport or provide transportation of property* * * * *for compensation* * * *."

Moreover "carrier" as used in the bill of lading is not to be construed in the narrow sense of "rail carrier", as petitioners urge, but in the sense that it would be understood by shippers; and the best evidence that shippers consider freight forwarders carriers with whom claims are to be lodged is the many thousands of claims which are annually filed with them. Petitioners' use of the term in connection with freight claim matters is evidenced by the definition in the Freight Claim Rules of the Association of American Railroads, submitted with the opposing affidavits, Rule 3(a):

> "Any common carrier, including railroad, steamship, transfer or other transportation company."

3. In forwarder transportation it is logical that the forwarder, with whom the shipper deals, should be the initial carrier; and there is no possible question of the intention of Congress to make freight forwarders initially responsible for losses in any part of the transportation service provided by them, with exceptions not here material. Neither the language of 1013 nor the obvious purpose of 20(12) permit the supposition that the right of subrogation given by the latter was designed to be narrower than the initial liability imposed by 20(11). Each applies "in the case of service subject to this chapter" which by definition of the statute means "any or all of the services, * * * which any person undertakes to perform *or provide* as a freight forwarder" with the sole exception of air carriage or incidental motor carriage. 49 U. S. Code 1002(7). The sections are obviously *in pari materia*, and it is not open to petitioners to concede respondent the liabilities of the one and deny the corresponding recourse of the other.

4. We believe no useful purpose will be served in here enlarging upon the opinion below so far as it points out (1) that the Carmack Amendment was designed to augment a shipper's remedies rather than shield the carrier primarily responsible for loss, and (2) that the commonlaw liability of a carrier is not the product of privity of contract, but of the law of bailment, misapprehension of which was the expressed basis of Representative Wolverton's difference with the House Committee Report on this point.

Respectfully submitted,

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